

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850

[www.montgomerycountymd.gov/content/council/boa/index.asp](http://www.montgomerycountymd.gov/content/council/boa/index.asp)

(240) 777-6600

**Case No. S-2710**

**PETITION OF DAYHILL, LLC**

OPINION OF THE BOARD

(Opinion Adopted December 8, 2010)

(Effective Date of Opinion: January 21, 2011)

Case No. S-2710 is an application, under Section 59-G-2.13.1 of the Zoning Ordinance, for a special exception to permit construction and operation of a Child Day Care Center. The subject property is part of Parcel A, Block C, Bel Pre Manor Subdivision, located at Bonifant Road and Catoctin Drive, in the R-200 Zone. The Hearing Examiner for Montgomery County held hearings on the application on October 23, 2009, November 20, 2009, January 15, 2010, January 22, 2010, April 9, 2010 and May 21, 2010, initially closed the record in the case on June 1, 2010, then re-opened and closed it again on October 15, 2010. On October 22, 2010, the Hearing Examiner issued a Report and Recommendation for approval of the special exception, subject to conditions.

The Board of Appeals received requests for Oral Argument on the Report and Recommendation from Martin J. Hutt, Esquire, on behalf of Dayhill, LLC and from members of the Beacon Place Community Association. The Board held oral argument on December 8, 2010. Martin J. Hutt, Esquire appeared on behalf of Dayhill, LLC. Peter Zara and Janice Walden, members of Beacon Place Community Association, Inc., also appeared.

Decision of the Board:

Special Exception Granted Subject  
To Conditions Enumerated Below.

**Summary of Oral Argument**

Mr. Hutt stated that Dayhill LLC takes exception to Condition Nos. 5, 6 and 21 of the twenty two conditions of approval recommended by the Hearing Examiner.

Condition No. 6 states:

No sign may be posted unless and until Petitioner obtains a permit therefor and a sign variance, where required, and a copy of these documents are filed with the Board of Appeals. Signage must be limited to black and white signs, including one monument sign, one wall sign with Petitioner's logo and one sign over the entrance with their motto "Community Begins Here, " as depicted on Petitioner's elevations (Exhibit 138). The monument sign will be restricted to five feet in height and seven feet in width, as measured from the outside of the support structure. The signs may be illuminated at the times specified in the revised statement of operations (Exhibit 223(a)).

Mr. Hutt stated that the Petitioner does not see the need, as the Hearing Examiner proposes, for all lettering on the signs to be black. The colors on the signs are the corporate trademark for Kiddie Academy. Mr. Hutt stated that the proposed monument sign is "hundreds and hundreds of feet" [Transcript, Oral Argument, December 8, 2010, p.6] from the nearest residential property.

Condition No. 5 states:

Petitioner must create a Community Liaison Committee (CLC) to discuss and address issues of concern to Petitioner and/or the community. The CLC shall consist of Petitioner's representative, up to two representatives of BPHOA and representatives from any nearby civic association or homeowners association wishing to participate. If a new People's Counsel has been appointed, he/she will serve as an *ex officio* member of the CLC. The CLC is intended to provide a means and mechanism for communication and interaction between the daycare center and its neighbors. The CLC must have an initial organizational meeting prior to the start of construction, and meet three times a year, thereafter. Minutes of meetings must be taken and distributed by Petitioner or its designee, and the CLC must prepare an annual report to be submitted to the Board of Appeals, which should include these minutes. There will be no requirements for a quorum, voting, or specific attendance. There should be a traffic monitoring report from the facility's transportation coordinator evaluating the traffic situation, including during special events, and that report should attach the follow-up traffic study required elsewhere in these conditions.

Proposed Condition 21 states:

The Board will retain jurisdiction to monitor impact of operations upon the community. During the first year of operations, Petitioner may not exceed an enrollment of 100 children on site at any time. Towards the end of that period,

Petitioner must have a traffic study done to determine delays and queuing at the intersection of Catoctin Drive and Bonifant Road during the three-hour peak weekday periods of two typical days. The results of the traffic study, which should indicate the number of children in attendance on each studied day, must be shared with BPHOA and filed with the Board of Appeals. The Board will thereafter schedule a work session to determine whether conditions are such that Petitioner may increase the number of children on site at any time to 138, the full number requested by Petitioner.

Mr. Hutt stated that Dayhill disagrees with the requirement that Petitioner not exceed 100 children on site at any one time during the first year. Mr. Hutt stated that the phasing and sequencing of operations required by condition 21 is not necessary because "the evidence of record demonstrates that at the present time there is not a queuing or delay problem." [Transcript, Oral Argument, December 8, 2010, p. 7]. Mr. Hutt also stated that Petitioner's Transportation Planner and MNCPPC transportation planning staff "concur that with the implementation of the special exception, the queuing or delay that currently exists will not be significantly affected by that." [Transcript, Oral Argument, December 8, 2010, p. 8].

Mr. Hutt further stated that the Petitioner disagrees with the requirement for a follow up traffic study because the evidence in the record does not support a need for it. He cited page 34 of the Hearing Examiner's Report and Recommendation in which the Hearing Examiner says "the central issue in this case is the impact of the anticipated traffic from the proposed daycare center upon the community. This issue is particularly important in this matter because the sole vehicular access to the daycare facility will be off Catoctin Drive, a secondary residential street, which is the sole vehicular access for the community to reach the outside world." Mr. Hutt stated that Petitioner's traffic engineer, Micky Cornelius, provided the only expert testimony regarding transportation planning. Mr. Cornelius performed standard Local Area Transportation Review, and Policy Area Mobility Review, using standard trip generation rates for child daycare centers. Mr. Cornelius also did a queuing study and a delay study. Mr. Hutt stated that the results of those studies show that there is currently not a queuing or delay problem and that there will not be a queuing or delay problem with the additional traffic generated by the proposed child daycare facility.

Mr. Hutt stated that in response to comments and questions from the community, MNCPPC Planning staff asked Mr. Cornelius to conduct queuing counts along Bonifant Road extending from the signal at Layhill Road and on Catoctin Drive at the approach to Bonifant Road. Mr. Cornelius did the counts on April 16, 2009 and issued a revised traffic study on April 29, 2009. Mr. Hutt quoted extensively from the Hearing Examiner's Report, (p. 37- 40) to support the conclusions that the proposed child daycare center will not cause queuing problems either on Bonifant Road or on Catoctin Drive and that the average delay

for motorists exiting from Catoctin Drive onto Bonifant Road was just over 16 seconds, with a maximum recorded delay of 74 seconds.

Mr. Hutt also referred to page 46 of the Hearing Examiner's Report, which states: "The Petitioner's interpretation of the impacts of the delay and queuing data is supported by Technical staff's evaluation of the data," and goes on to quote Shariar Etemadi, Transportation Planning Supervisor, who expresses Transportation Planning staff's concurrence with the conclusions of the Petitioner's queuing and traffic delay studies.

Peter Zara presented argument as a resident of the community and stated that his position echoes the community's position.

Mr. Zara: stated "I would say that the hearing examiner summed it up when he said that the major problem here us is that the entrance is off our community road..." [Transcript, Oral Argument, December 8, 2010 p. 33].

Mr. Zara further stated that he does not dispute the Applicant's numbers related to traffic. There is usually not a lot of traffic in the neighborhood "because the only people exiting are our residents." [Transcript, Oral Argument, December 8, 2010, p. 24]. He stated that there are 108 townhouses there and residents of Catoctin Drive do sometimes have trouble exiting the neighborhood, because of the proximity of the intersection of Catoctin and Bonifant with the intersection of Bonifant and Layhill. He stated that "most of our residents would agree that it's a dangerous intersection, even though the numbers don't show that there have been a lot of accidents there." [p. 24]. The daycare center will double or more the amount of traffic on Catoctin Drive and the additional traffic associated with the daycare center will shorten the window of opportunity for residents to turn off of Catoctin onto Bonifant.

Mr. Zara stated that the proposed daycare center is incompatible with the surrounding community because Catoctin Drive is a cul de sac. He stated that there will be more traffic from the daycare center than from the community on Catoctin Drive, "turning it into a commercial road." [Transcript, Oral Argument, December 8, 2010 p. 26]. Mr. Zara stated that the fact that Catoctin Drive is a cul de sac creates a non inherent adverse effect.

Mr. Zara stated that the proposed special exception should have been filed and evaluated as a special exception for a private educational institution rather than a daycare center. Mr. Zara said that there should be strict adherence to definitions in the law and that the proposed use falls more within the definition of a nursery school than a daycare center. Mr. Zara stated that the master plan is 17 years old and is outdated and that daycare centers have "evolved quite substantially over the years [Transcript, Oral Argument, December 8, 2010 p. 29]. Mr. Zara stated that most of the special exceptions for daycare centers have been approved for up to 12 children.

Mr. Zara said that the proposed number of special events – one a week – is “excessive” He further stated that the size of the monument sign is very large, it may impose a safety concern because of its size and location, and its location at the top of Catoctin Drive “goes to the identity of our community.” [Transcript, Oral Argument, December 8, 2010 p.34].

Mr. Zara suggested that the number of children enrolled at the daycare center be reduced, “That’s another way that this could be, our problems could be dealt with. Maybe 60 children instead of 100 or the 140 that are being proposed. To make it a smaller daycare center so that the traffic impact wouldn’t be quite so large. And in addition, for the further traffic studies that are being considered, we thought the criteria were not particularly well defined so we would recommend that if the traffic studies take place, that they be undertaken with at least 95 percent of the quota of full-time children enrolled because for whatever reason the first year there may be low attendance, and if traffic studies are done and there are only 50 children in the school, the increase to 138 children from 100 may not be representative of the real traffic situation on the ground. Also our community would like to be involved with the marking of which trees will be removed along the border. This part of the property is ours and we would like to make sure that no excess trees are cut.” [Transcript, Oral Argument, December 8, 2010 p. 35].

Mr. Zara stated that the Sandy Spring Bank property, adjacent to the subject site, is for sale, that that property has two entrances and exits and “there should have been more of an effort” for the daycare center to have entrances and exits on Bonifant and/or Layhill Road.

Janice Walden stated that from her “personal perspective on the traffic situation,” cars exiting from Catoctin Drive will have to compete with cars exiting from the daycare center. She described the process of turning left from Catoctin Drive onto Bonifant Road. She expressed her fear that children waiting for school buses may be hurt in an accident. She suggested that the daycare center “should post a traffic person at the intersection of Catoctin and Bonifant [??] to help with the safety issues of getting in and out.” She also suggested a delayed light to help control traffic. [Transcript, Oral Argument, December 8, 2010, pp. 37-39].

Ms. Walden stated that she feels limiting the number of children on site to 100 for the first year is very reasonable. She asked the Board to consider the application “from other than a statistical angle that it’s going to have a real impact on our neighborhood and I fear for the children and everyone using those roadways.” [Transcript, Oral Argument, December 8, 2010, pp. 37-38 p. 41].

### Rebuttal

Mr. Hutt pointed out that the Hearing Examiner thoroughly analyzed the comparison of daycare centers to schools and concluded, "While the community's concerns are understandable, it does not make sense to interpret the Zoning Ordinance as intending to put a severe cap on the educational approach to child care." [Hearing Examiner's October 22, 2010 Report & Recommendation, in Case No. S-2710, p. 100]

Mr. Hutt pointed out that the Master Plan specifically recommends that access to the daycare center shall be from Catoctin Drive to avoid conflicting turning movements closer to the intersection of Bonifant and Layhill Road.

Mr. Hutt stated that the Petitioner will be required to construct sidewalks on both sides of Catoctin Drive that children going to the school buses will be able to use.

Mr. Hutt pointed to the Hearing Examiner's finding that the number of special events is not excessive, given that 12 events will be staff meetings and that off-site parking and shuttle service will be provided

Mr. Hutt responded to a concern expressed by Mr. Zara that opening of the ICC near Layhill Road near the subject property will create cumulative adverse traffic impacts on the neighborhood by pointing out Mr. Cornelius's testimony that the ICC will actually reduce the amount of traffic at the intersection of Bonifant and Layhill Roads.

## **FINDINGS AND CONCLUSIONS**

After careful consideration and review of the record in the case and the arguments made at Oral Argument, the Board adopts the Hearing Examiner's Report and Recommendation, with revisions to Condition Nos. 6 and 21 and grants the special exception subject to the Conditions below.

The Board finds that the evidence does not support restricting site signage to black and white only. The Board agrees with the other limitations on signage proposed by the Hearing Examiner in Condition 6, and further finds that the permitting process for all signs on the site will provide adequate review of the proposed signage.

The Board agrees with the parties and the Hearing Examiner that the impact of anticipated traffic from the proposed daycare center upon the community is the central issue in the case. The Board further agrees with the Hearing Examiner and finds that based upon the substantial evidence in the record, transportation, safety and parking considerations should not prevent this special exception from being granted, subject to the conditions enumerated below. Specifically, the Board finds that Condition 21, which limits the number of children

on site during the first year of operations and requires a follow up traffic study toward the end of that year, is warranted in light of the inherent imprecision of projections as to how implementation of the special exception will affect traffic flow into and out of the adjacent residential community.

The Board finds that it is the number of children on the special exception site at any given time, rather than the center's enrollment, that has the potential to affect surrounding properties. The Board adopts the Hearing Examiner's proposed limitation on the number of children on site during the first year, and removes the reference to enrollment in the second sentence of Condition 21.

**CONDITIONS:**

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in the Hearing Examiner's report and in the Opinion of the Board.
2. Petitioner is granted a waiver to allow five of the parking spaces on the southern end of the site labeled on the site plan as compact-car spaces.
3. Since the proposed use will require subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9), approval of this special exception is conditioned upon approval of a preliminary plan of subdivision by the Planning Board. If changes to the site plan or other plans filed in this case are required at subdivision, Petitioner must request modification of these special exceptions from the Board of Appeals.
4. Petitioner must comply with the terms of its revised Site Plan (Exhibit 223(d)), its Landscape Plans (Exhibits 223(e), (f) and (g)); and its Lighting and Photometric Plans (Exhibits 148(e) and (f)).
5. Petitioner must create a Community Liaison Committee (CLC) to discuss and address issues of concern to Petitioner and/or the community. The CLC shall consist of Petitioner's representative, up to two representatives of BPHOA and representatives from any nearby civic association or homeowners association wishing to participate. If a new People's Counsel has been appointed, he/she will serve as an *ex officio* member of the CLC. The CLC is intended to provide a means and mechanism for communication and interaction between the daycare center and its neighbors. The CLC must have an initial organizational meeting prior to the start of construction, and meet three times a year, thereafter. Minutes of meetings must be taken and distributed by Petitioner or its designee, and the CLC must prepare an annual report to be submitted to the Board of Appeals, which should include these minutes. There will be no requirements for a quorum, voting, or specific attendance. There should be a traffic monitoring report from the facility's transportation coordinator

evaluating the traffic situation, including during special events, and that report should attach the follow-up traffic study required elsewhere in these conditions.

6. No sign may be posted unless and until Petitioner obtains a permit therefor and a sign variance, where required, and a copy of these documents are filed with the Board of Appeals. Signage must be limited to one monument sign, one wall sign with Petitioner's logo and one sign over the entrance with their motto "Community Begins Here, " as depicted Petitioner's elevations (Exhibit 138). The monument sign will be restricted to five feet in height and seven feet in width, as measured from the outside of the support structure. The signs may be illuminated at the times specified in the revised statement of operations (Exhibit 223(a)).
7. Petitioner must comply with the conditions of the revised Preliminary Forest Conservation Plan, Exhibit 116(g), until approval of the Final Forest Conservation Plan by the Planning Board, after which time Petitioner must comply with the terms of the Final Forest Conservation Plan.
8. Petitioner must comply with the stormwater management plan ultimately approved by DPS and adopted at subdivision, and must obtain and comply with sediment and erosion control permits.
9. Petitioner must comply with the terms of its Revised Statement of Operations of April 28, 2010 (Exhibit 223(a)).
10. Petitioner must comply with its revised Transportation Management Plan (Exhibit 209(g))). Its regulations must be strictly monitored and enforced in accordance with the TMP. If changes in the TMP are made at subdivision, Petitioner must request a modification of this special exception from the Board of Appeals to so reflect.
11. The number of full-time equivalent employees may not exceed 23 on site at any given time.
12. Petitioner must not have more than 138 daycare children on site at any one time.
13. Petitioner must comply with all Maryland State and Montgomery County licensure requirements and standards for the operation of a child day care facility.
14. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioner is bound by the Affidavits of Compliance submitted in connection with this case, Exhibits 129, 170, 196 and 197, in which Petitioner and the franchisee operators, Milena and Garrett Mattingly of AMG, LLC, certified that they will

comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavits as a condition of approval for the special exception.

15. In no event may a child be dropped off before a staff member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.
16. All children must be under the direct supervision of a staff member at all times, both inside and outside the building.
17. The Petitioner shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.
18. The Petitioner shall maintain the grounds in a clean condition, free from debris, on a daily basis.
19. Petitioner's contract with its patrons must specify that users of the childcare facility shall not park on the neighborhood streets while dropping off or picking up their children.
20. During construction of the daycare facility, Petitioner must ensure that construction equipment and trucks are not parked off site so as to interfere with the free flow of traffic on Catoctin Drive, and shall adhere to all requirements of the County's noise ordinance.
21. The Board will retain jurisdiction to monitor the impacts of operations upon the community. During the first year of operations, Petitioner may not exceed 100 children on site at any time. Towards the end of that period, Petitioner must have a traffic study done to determine delays and queuing at the intersection of Catoctin Drive and Bonifant Road during the three-hour peak weekday periods of two typical days. The results of the traffic study, which should indicate the number of children in attendance on each studied day, must be shared with BPHOA and filed with the Board of Appeals. The Board will thereafter schedule a work session to determine whether conditions are such that Petitioner may increase the number of children on site at any time to 138, the full number requested by Petitioner.
22. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Therefore, based upon the foregoing, on a motion by David K. Perdue, Vice-Chair, seconded by Catherine G. Titus, Chair, with Carolyn J. Shawaker, Stanley B. Boyd and Walter S. Booth in agreement, the Board adopts the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

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Catherine G. Titus  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 21<sup>st</sup> day of January, 2011.

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Katherine Freeman  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.